National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: July 10, 1998

TO: F. Rozier Sharp, Regional Director, Region 17

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Nelcon, Inc., Case 17-CA-19251

530-4080-5012-6700

This case was resubmitted for advice on whether (1) the Union lost majority status in the unit defined by Steiny/Daniel;[(1)] and (2) the alleged unfair labor practices tainted the Union's asserted loss of majority status.

The Region has found that the number of employees in the Steiny/Daniel unit consist of only current employees, because the prior employees either quit or were discharged for cause. Thus, the Region has found that the Union in fact suffered an actual loss of majority status, viz., that six of seven current unit employees indicated that they no longer wish to be represented by the Union.

The Region also found that the alleged unfair labor practices did not taint the Union's loss of majority status, in part because the alleged violations occurred after the Union had already lost majority status.

Based upon the above Region findings, we conclude that the Region should dismiss the Section 8(a)(5) allegation, absent withdrawal.

In Celanese Corp. of America, 95 NLRB 664 (1951), the Board held that upon the expiration of the certification year or a contract, an employer may withdraw recognition if either the union has in fact lost majority support, or the employer has a good-faith doubt of the union's majority support or the employer has a good-faith doubt of the union's majority status supported by objective considerations.[(2)]

In Chelsea Industries,[(3)] the General Counsel, in arguing to the Board that the employer was not privileged to withdraw recognition from the union, made an alternative argument that the Celanese "good faith" doubt standard should be overturned. The General Counsel argued that the Celanese rule encourages employers to engage in self-help measures which undermine the Supreme Court's view that, "even after the certification year has passed, the better practice is for an employer with doubts to keep bargaining and petition the Board for a new election or other relief."[(4)] Thus, the General Counsel argued that a secret-ballot election should be the only means by which a Section 9(a) representative's presumption of majority status can be rebutted.

We conclude that it would not be appropriate in this case to issue complaint solely on the General Counsel's alternate theory in Chelsea Industries, particularly in view of the Board's recent pronouncement in Auciello. The Employer here had knowledge of the loss of majority status, and the Board currently permits an employer to withdraw recognition on this basis. Thus, there is no argument under current Board law supporting a violation. Furthermore, retroactive application of any new rule of law announced in Chelsea would be uncertain. Thus, under the law as it now stands, the Region should dispose of this case of in accord with the long standing practice of General Counsels to dismiss charges alleging that an employer unlawfully withdrew recognition after the certification year or after expiration of a contract in circumstances where the union has in fact lost majority status among unit employees without any unlawful interference by the employer.[(5)]

Accordingly, the Region should dismiss this Section 8(a)(5) charge, absent withdrawal.

B.J.K.

[1] Steiny and Company, Inc., 308 NLRB 1323 (1992) and Daniel Construction, 133 NLRB 264 (1961).

[2] This principle was recently noted by the Board in Auciello Iron Works, 317 NLRB 364 (1995), on remand from 980 F.2d 804 (1st Cir. 1992).

[3] Cases 7-CA-36846 et al.

[4] Brooks v. NLRB, 348 U.S. 96, 104 n.18 (1954). See also Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 50 n.16 (1987) (allowing employers to rely on employees' rights in refusing to bargain is inimical to industrial peace) (dictum).

[5] See, e.g., Ayers Corp., Case 21-CA-29761, Advice Memorandum dated July 18, 1994; J.P. Data Com, Cases 21-CA-26562 and 26579, Advice Memorandum dated April 3, 1989.